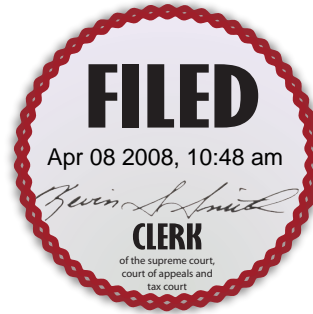


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

| | | |
|-----------------------|---|----------------------|
| KEVIN E. DEAN, |) | |
| |) | |
| Appellant-Petitioner, |) | |
| |) | |
| vs. |) | No. 45A03-0701-PC-13 |
| |) | |
| STATE OF INDIANA, |) | |
| |) | |
| Appellee-Respondent. |) | |

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Judge
The Honorable Kathleen A. Sullivan, Magistrate
Cause No. 45G04-0508-PC-8

April 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Kevin E. Dean, *pro se*, appeals the denial of his petition for post-conviction relief.

We affirm.

ISSUES

1. Whether a petition for post-conviction relief is the proper vehicle for Dean's challenge to his sentence.
2. Whether Dean is entitled to additional credit time.

FACTS

On July 7, 1998, the State charged Dean with the following offenses: Count I, auto theft, as a class C felony;¹ Counts II and III, intimidation, as class D felonies;² and Count IV, resisting law enforcement, as a Class D felony.³ Dean was also charged with being an habitual offender. Subsequently, the parties tendered an open plea⁴ agreement to the trial court. Pursuant to the plea agreement, the State agreed to dismiss the habitual offender enhancement in exchange for Dean's guilty plea to the remaining four counts. Accordingly, at his guilty plea hearing on September 30, 2004, Dean pled guilty to counts I through IV.

At Dean's sentencing hearing on November 24, 2004, the trial court imposed an aggregate sentence of fourteen years, comprised of an eight-year sentence on Count I;

¹ Ind. Code § 35-43-4-2.5.

² I.C. § 35-45-2-1.

³ I.C. § 35-44-3-3.

⁴ "[A] plea agreement wherein the issue of sentencing is left to the trial court's discretion is often referred to as an 'open plea.'" *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004).

and three two-year sentences on Counts II, III, and IV.⁵ The trial court ordered the sentences to be served consecutively to Dean's sentences on other Indiana and Illinois convictions.⁶ The trial court also awarded to Dean a total of 196 days of jail time credit. Lastly, the trial court advised Dean of his right to file a petition for post-conviction relief and his right to challenge his sentence on direct appeal. When Dean stated that he wanted to pursue a direct appeal, the trial court appointed counsel to represent him.

On December 22, 2004, Dean filed an appeal to this court; however, on May 23, 2005, he filed a *pro se* motion to withdraw his appeal without prejudice. On June 7, 2005, this court granted Dean's motion. On August 9, 2005, Dean filed a *pro se* petition for post-conviction relief, wherein he argued that (1) the trial court's sentence violated his Fifth, Sixth, and Fourteenth Amendment rights; (2) he was not advised of his *Boykin* rights; (3) he received ineffective assistance of counsel; (4) the trial court improperly ordered consecutive sentences; (5) the State failed to prove his guilt beyond a reasonable doubt with regard to the aggravating circumstances; (6) his fourteen-year sentence was improper; (7) his sentence was not authorized by statute; and (8) he was deprived of jail time credit.

⁵ The trial court ordered Dean's sentences on Counts I and IV to be served consecutively, for an aggregate sentence of ten years. Dean's sentence on Count II was ordered served consecutively to Counts I and IV, and his sentence on Count III was ordered served consecutively to Counts I, II, and IV.

⁶ In its brief, the State refers us to the website for the Illinois Department of Corrections (<http://www.idoc.state.il.us/subsections/search/default.asp>). Dean's profile yields his photograph and inmate identification number (B56742). It further indicates that in 1999, Dean was sentenced to fourteen years imprisonment for disarming a peace officer and receiving, possessing, or selling a stolen vehicle.

Given that Dean was already incarcerated in Illinois, the post-conviction court ruled that the matter could be heard through affidavit and exhibits. On February 3, 2006, the State submitted the transcripts of Dean's guilty plea and sentencing hearings to the post-conviction court. Dean did not object to the State's exhibits. On July 27, 2006, the post-conviction court issued findings of fact and conclusions of law denying Dean's petition for post-conviction relief.

DECISION

1. Sentencing

Dean argues that the trial court erred when it imposed consecutive sentences. The State responds that a petition for post-conviction relief is not the proper vehicle for Dean's challenge because Dean pled guilty pursuant to an open plea.

A person who pleads guilty may not challenge the propriety of that conviction on direct appeal. *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004). However, a person who pleads guilty may contest, on direct appeal, the merits of a trial court's sentencing decision where the trial court has exercised sentencing discretion, i.e., where the sentence is not fixed by the plea agreement. *Id.* (citing *Tumulty v. State*, 666 N.E.2d 394, 395-96 (Ind. 1996)). Thus, "the proper procedure for an individual who has pled guilty in an open plea to challenge the sentence imposed is to file a direct appeal, or if the time for filing a direct appeal has run, to file an appeal under [Indiana] Post-Conviction Rule 2." *Collins*, 817 N.E.2d at 233.

Here, after Dean pled guilty pursuant to an open plea, he filed and subsequently withdrew his direct appeal. In light of Dean's decision to forgo direct appeal, his attempt

to challenge his sentence via post-conviction proceedings was improper. Thus, the post-conviction court lacked jurisdiction to address Dean's challenge to his sentence, and we cannot address the merits of his claim.

2. Jail Time Credit

Next, Dean argues that the trial court "deprived [him] of jail time credit spent awaiting final disposition of the case." Dean's Br. at 11. Specifically, Dean argues that the trial court failed to award him credit for time spent serving an Illinois sentence while he simultaneously awaited transportation to Indiana.

A post-conviction relief proceeding is not a substitute for direct appeal, but rather, is a process for raising issues unknown or not available at trial; an issue known and available but not raised on direct appeal may not be raised in post-conviction proceedings. *Collins*, 817 N.E.2d at 231. At the sentencing hearing, the trial court awarded Dean 196 days of jail time credit. Thus, by the time Dean filed his direct appeal, any discrepancy regarding the trial court's award of jail time credit was certainly an issue known and available. Dean's subsequent decision to withdraw his direct appeal foreclosed the possibility of him properly raising this issue in a post-conviction context. Because Dean failed to raise the issue of jail time credit on direct appeal, he was not entitled to raise it in post-conviction proceedings.

His waiver notwithstanding, Dean's argument must fail. Indiana Code section 35-50-6-3 provides that a criminal defendant is entitled to credit for time spent in confinement while awaiting trial or sentencing. To earn such credit, the confinement

must be a result of the charge for which the defendant is sentenced. *Willoughby v. State*, 626 N.E.2d 601, 602 (Ind. Ct. App. 1993). Moreover,

[i]t is well settled that where a person incarcerated awaiting trial on more than one charge is sentenced to concurrent terms for the separate crimes, [Indiana Code §] 35-50-6-3 entitles him to receive credit time applied against each separate term. However, where he receives consecutive terms, he is only allowed credit time against the total or aggregate of the terms.

Stephens v. State, 735 N.E.2d 278, 284 (Ind. Ct. App. 2000) (emphasis added). Here, the record reveals that Dean was in custody on his Illinois case. Thus, his Illinois confinement does not entitle him to additional jail time credit in Indiana, because the Illinois confinement did not result from the instant Indiana charges. Accordingly, we conclude that the 196 days of credit time that Dean earned as he awaited disposition were properly credited against this aggregate sentence. *See id.* The post-conviction court did not err when it denied Dean's request for additional jail time credit.

Affirmed.

BAKER, C.J., and BRADFORD, J., concur.